83-2109

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No. ..-..

IN THE

Supreme Court of the United States

October Term, 1983

RODNEY E. DOMINEY,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. Whether a court should determine an issue of causation in a Federal Employers' Liability Act case as a matter of law when a jury found that a railroad violated its own safety order, that that violation was negligence, but that the railroad's negligence did not cause, in whole or in part, its employee's crippling injuries.

2. Whether a district court may apply a local rule in direct contravention of the Seventh Amendment to the United States Constitution and to Rule 59 of the Federal Rules of Civil Procedure, thereby effectively denying the Petitioner the right to obtain juror affidavits in support of his motion for a new trial; and where the jury's finding was illogical in light of all the evidence presented, thereby raising a serious question as to whether Petitioner received a fair trial.

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THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.,

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PETITION FOR WRIT OF CERTIORARI.

Petitioner, Rodney E. Dominey, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit.

THE OPINIONS BELOW.

The Court of Appeals rendered its decision by unpublished Memorandum Opinion, No. 82-1531, reproduced at Appendix 1. The unpublished Memorandum Opinion of the Court of Appeals on Rehearing is reproduced at Appendix 2.

JURISDICTION.

1. This is an action brought under the Federal Employers' Liability Act in which the Plaintiff-Petitioner, Rodney E. Dominey (hereinafter Dominey) contends that the Defendant-Respondent, the Atchison, Topeka & Santa Fe Railroad Co. (hereinafter Santa Fe), was liable for crippling injuries he suffered during the course of his employment with the railroad.

2. The first opinion below was filed on July 25, 1983. A timely petition for rehearing was granted on September 19, 1983. The opinion following the rehearing was filed on March 20, 1984.

3. The jurisdiction of the United States District Court in which this action was brought was based on 28 U.S.C. §1291.

4. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED.

The Seventh Amendment, United States Constitution, provides:

> "[t]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 51 of Title 45 of the United States Code provides in pertinent part:

> Every common carrier by railroad while engaging in commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2071 of Title 28 of the United States Code provides:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules

shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

Section 2072 of Title 28 of the United States Code provides in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts. . . .
>
> Such rules shall not abridge, enlarge or modify any substantative right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Rule 83 of the Federal Rules of Civil Procedure provides:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . .

Rule 59 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . .
>
> (b) Time for Motion. A motion for a new trial shall be served *not later than 10 days after the entry of the judgment.*
>
> (c) Time for Serving Affidavits. When a motion for new trial is based upon *affidavits* they *shall be served with the motion.* . . . (emphasis added)

Local Rule 8.2(d) for the Northern District of Texas provides:

> Contact with Jurors. A party, an attorney in a case, or any representative of either shall not, before or after trial, contact any juror, prospective juror, or a juror's relatives, friends, or associates, except upon explicit leave of the Court.

STATEMENT OF THE CASE.

Procedural Statement.

This case was tried to a jury which decided that the Santa Fe's conduct violated its own safety order, that this violation was negligence, but which failed to find that such negligence was a legal cause in whole or in part, no matter how small, of Petitioner Dominey's injuries. Judgment was entered on the verdict directing that Dominey be denied recovery for his injuries. A Motion for Judgment non obstante verdicto or, in the alternative, A Motion for a New Trial, filed on behalf of Dominey was denied. The trial court invoked a local rule and denied Dominey timely permission to interview jurors and obtain affidavits to support his Motion for a New Trial. Petitioner Dominey seeks review of the affirmance of the District Court's judgment which denied him compensation under the Federal Employers' Liability Act for serious injuries caused by the railroad's negligence when Dominey was crushed between a moving locomotive and a caboose rolling in opposite directions.

STATEMENT OF THE FACTS.

The injury of which the Petitioner complains occurred under circumstances which are very difficult to understand without reference to photographs and diagrams. (The Court of Appeals used a sentence of 119 words in a futile attempt to explain what happened. Appendix 1 (page 4).) Therefore, Petitioner Dominey lodges Exhibits A, B, and C to aid the Court. Exhibit A is a

series of photographs which portray the type of equipment and switching areas involved. Exhibit B is a step-by-step diagram of the drop/switching movement. Exhibit C is a Santa Fe map of the scene of the accident made by Santa Fe engineers the day after Dominey's accident. It shows that *all* activities occurred within this zone of danger.

Dominey urges the Court to stop here and study these exhibits before reading the remainder of his brief. The Court then will be more easily able to understand the sequence of events which led to the Petitioner's disabling injuries.

Dominey was employed as a brakeman/conductor by the Santa Fe railroad. He was injured on November 7, 1979 on the "Maryneal Turn," a Santa Fe job assignment which involved operating a train, and delivering and picking up railroad cars, from the yards in Hamlin, Texas, through Sweetwater, to Maryneal and back to Hamlin. The crew consisted of Engineer Bell, Head Brakeman Clark, Rear Brakeman Aydellote, and Conductor Dominey. The train was powered by two locomotives connected back to back.

Bell and Clark were riding in the forward locomotive which malfunctioned. This caused smoke to come into the cab.[1] By the time the train reached Maryneal, the smoke had become intolerable. Therefore, Bell and Clark asked Dominey to agree to reverse the positions of the engines for the return trip to Hamlin by performing a "drop switching" movement. The mechanics of "drop switching" movements are easier to understand by referring to Exhibit B.

In order to reverse the locomotive positions, the caboose had to be "dropped" from the rear of the trailing engine and "switched" to the front of the malfunctioning locomotive. This would change the malfunctioning loco-

[1]In addition, the radio in the lead engine was not operating.

motive to the rear position for the return trip. The engines would be directed forward from the main line onto a parallel siding, Exhibit B (page 2), the caboose would be allowed to roll free on the main track past this siding, Exhibit B (page 3), and the engines then would be backed up from the siding onto the main line. Exhibit B (page 3). The trailing engine thus would become the "lead" locomotive for the return trip.

The drop switching movement began when the train (two locomotives and a caboose) pulled forward to the switch which controlled movement into the siding where the drop would be made. Exhibit B (page 1). Aydellote took up his position at the switch. He controlled the entire movement and, in addition, acted as Engineer Bell's "eyes" during the locomotive back-up portion of the move because the lead locomotive's radio did not work properly. The engines backed up the caboose for the forward movement. Dominey was riding on the caboose in order to pull the pin when Aydellote directed him to do so. Engineer Bell accelerated the engines. Dominey pulled the pin lifter which permitted the mechanical separation of the caboose from the locomotives. Bell increased his speed and Aydellote threw the switch which caused the locomotive to go into the siding. The caboose was coasting free down a slight decline in the same direction. Aydellote threw the switch so that the caboose would stay on the main line.

Aydellote then gave Bell a stop sign, followed by an immediate back-up sign, even though the caboose had not yet cleared the fouling/clearance point ("zone of danger") created by the siding track and the main line. Exhibit B (page 3). This was in specific violation of a Santa Fe safety order. Bell began his back-up movement without sounding his whistle as specifically required by Santa Fe safety rules.

In the meantime, the caboose dramatically slowed to below a walking speed. Before it got through the fouling point (out of the "zone of danger"). Dominey feared that the caboose would foul (block) the switch, thereby preventing the switching movement. Dominey stepped off the caboose in the proper manner (facing the caboose and with his back to the locomotives) and began inspecting the caboose's braking mechanism. Exhibit A (page 1). He was struck by the engines backing at Aydellote's direction toward the switch within the "zone of danger," Exhibit B (page 3), pinned and twisted between the caboose which he had been inspecting and the backing locomotives, causing his body to be crushed between the equipment moving in opposite directions.

Dominey's body was finally thrown loose. He almost died. He suffered multiple fractures to his ribs, a broken thumb, flail chest, internal derangement of his right shoulder, and bruises to his heart. He has developed hypertension as permanent residue of the tremendous trauma caused by the accident. He has never been physically able to return to work for the railroad.

At trial, the jury found that the Santa Fe violated its own safety rule which prohibited its employees from directing the locomotives to back up before the caboose on which Dominey was riding was clear of the fouling/clearance, or "zone of danger," point; it found that this was negligence. Inexplicably, the jury found that this negligence was not the legal cause, even in part, of Dominey's injuries.

Stunned by the jury's failure to find legal cause because such a finding was so at odds with the evidence presented, with common sense, and was, indeed, internally inconsistent, Dominey immediately considered the possibility of juror misconduct. He instantly made an oral motion requesting permission to interview the jurors in order

to provide the required affidavits for a motion for a new trial under Rule 59 of the Federal Rules of Civil Procedure.[2] The court denied the oral motion; it did, however, grant leave to file a written motion. Dominey immediately filed a written motion. The Santa Fe filed an opposition to this motion.

Meanwhile, the clock was running on the ten days allowed in which to file a motion for a new trial. Fed. R. Civ. P. 59(b). "When a motion for new trial is based upon affidavits they shall be served with the motion." Fed. R. Civ. P. 59(c) Dominey was forced, therefore, to file his motion for a new trial without juror affidavits. The Santa Fe did not file an opposition to Dominey's motion for a new trial. The court finally ruled on Dominey's motion to interview the jurors twenty-one days after the entry of judgment, and eleven days after the expiration of the time permitted by Federal Rules of Civil Procedure 59(b) and 59(c). Dominey was effectively prohibited from access to Rule 59(c): The local rule denying juror interviews thus created a Catch-22 situation in which motions for a new trial based on juror misconduct will almost always be denied not on their merits but because they are untimely.

Dominey also filed a motion for judgment n.o.v. because there could have been but one reasonable conclusion in this case: The Santa Fe had violated its own safety rules; it was negligent. Therefore, as a matter of law, the Santa Fe's negligence was the cause of Dominey's injuries.

Nevertheless, the trial court denied both motions. The Fifth Circuit Court of Appeals affirmed the judgment of the trial court. The Circuit Court stated that the "effect"

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[2]The district court's local rules forbade interviews with jurors without the express permission of the court. Local Rule 8.2(d) (N. D. Tex.).

of the jury's finding that the Santa Fe's negligence was not the cause of Dominey's injuries meant that Dominey must have been the sole cause of his injuries. Appendix 1 (page 3). On rehearing, the Court of Appeals again affirmed the judgment, stating that the jury could have found that the Santa Fe's negligence was "solely related to avoidance of an equipment collision." A collision of the equipment might have resulted in an insurance claim. It is difficult to see how the mere "avoidance of an equipment collision" is related to the negligence the jury found, or "that Dominey should not have stepped off the caboose, or that such action or some momentary diversion of Dominey's attention was the sole cause of his being struck by the locomotive." Appendix 2 (page 2).[3]

Petitioner has suffered grievous injuries where the jury found that the Santa Fe was negligent but, contrary to the intent of Congress under the FELA, has been left with no compensation for those injuries, unless this Court grants relief in the form of an order for a new trial. The real tragedy, to the jury system and to Congressional intent as to that method to enforce the FELA, however, is that an obscure local rule has effectively foreclosed the possibility of review of juror misconduct, thus seriously impairing the worth of the right to a jury trial.

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[3]At oral argument during Rehearing, the Court of Appeals inquired if there was any evidence concerning the cigarette lighter which the Petitioner allegedly was retrieving when he was crushed between the moving equipment. Petitioner explained in a subsequent letter that a statement made to that effect "was purely 'hearsay' and not probative since not under oath." Appendix 3. Fed. R. Evid. 801(d)(1)(A)[1], 802; *Garcia v. United States,* 530 F.2d 650 (5th Cir. 1976); *United States v. Ragghianti,* 560 F.2d 1376, 1381 (9th Cir. 1977).

REASONS FOR GRANTING THE WRIT.

I.
INTRODUCTION.

A. The Lower Court's Misapprehension of the Causation Issue Is by Itself a Sufficient Reason for Granting the Writ.

This Court has not spoken on the issue of causation and the role of the jury in Federal Employers' Liability Act cases since *Gallick v. Baltimore and Ohio Railroad Co.*, 372 U.S. 108 (1963). *Gallick* expanded on the rule of *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506 (1957), that if a railroad's "negligence played any part, even the slightest," in an employee's injuries, the railroad is liable for those injuries. In spite of the apparent clarity of the Court's statement, further clarification of the rule of *Rogers* is needed.

The court below purported to follow *Rogers* because "[c]ausation was a fact issue for the jury." Appendix 2 (page 2). The implication is that causation in FELA cases is always a question of fact for the jury. *Rogers* did not so hold: "[W]here fair-minded jurors cannot honestly differ [as to] whether fault of the employer played any part in the employee's injury," causation is not a matter for jury consideration. *Id.* at 510. The drop switching movement was required because a Santa Fe engine malfunctioned, spewing smoke into the cab. Its radio was inoperative, forcing the engineer to visually (and negligently) direct the movement of the engines. The engines were backed up without a warning whistle. It is inconceivable that fair-minded men could differ as to whether these negligent acts caused Petitioner's injuries, at least in part. That is all that is required for a finding of liability under the Act. Thus, the defendant was negligent as a matter of law. The Fifth Circuit needs

this Court's instruction on causation in FELA cases where liability is so clear that reasonable men could not differ.

When Congress enacted the Federal Employers' Liability Act (FELA), it did not "crystallize the application of the Act by enacting specific rules to guide the courts." *Kernan v. American Dredging Co.*, 355 U.S. 426, 437 (1958). It is, therefore, up to the courts to determine consistent principles which will provide uniform application of the FELA to all injured railroad employees. Petitioner will show that he has been denied application of the FELA principles set down by this Court in *Rogers* and followed by most of the district courts. The Fifth Circuit requires this Court's direction because the Circuit's misconstruction of the causation issue threatens the uniform administration of a federal statute; it has effectively barred Petitioner from obtaining compensation for injuries clearly caused by the railroad's negligence.

B. Even if Causation Were a Jury Issue, the Local Rule Has Destroyed Review of Juror Misconduct.

Petitioner cannot even be certain that the jurors in his case were "fair-minded." The district court denied a timely oral motion and demanded a written motion requesting permission to interview the jurors under Local Rule 8.2(d). Since at least 1892, this Court has approved interviews with jurors and affidavits showing misconduct as a basis for a new trial. *Mattox v. United States*, 146 U.S. 140 (1892). Federal Rule of Civil Procedure 59(c) allows juror affidavits in support of a motion for a new trial. Yet, the district court applied a local rule in contravention of the Court's holding in *Mattox* and a Federal Rule of Civil Procedure: It did not grant permission to interview the jurors until twenty-one days after entry

of judgment which was eleven days after the ten days allowed to file affidavits in support of a motion for a new trial under Rule 59(b). This is a "threat to the goal of uniformity of federal procedure." This Court firmly rejected such threats to uniformity within a slightly different context in *Hanna v. Plumer*, 380 U.S. 460, 463 (1964). At least sixteen district courts have a similar local rule. Federal Local Court Rules, Callaghan (1983). Thus, beyond Petitioner's plight, the district courts need the authoritative guidance of this Court: A local rule should not be drafted or applied so as to thwart a Federal Rule of Civil Procedure or the Seventh Amendment to the United States Constitution.

II.

THERE IS CONFLICT BETWEEN THE CIRCUITS AS TO THE MEANING OF THE ROGERS "TEST" WHICH THREATENS UNIFORM APPLICATION OF A FEDERAL STATUTE.

In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957) this Court stated that "for practical purposes the inquiry in these [FELA] cases today rarely presents more than the single question whether the negligence of the employer played any part, *however small,* in the injury or death which is the subject of the suit." *Id.* at 508 (emphasis added). This Court also stated that "[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." *Id.* at 506 (emphasis added). The circuit courts need the Court's guidance as to whether *Rogers* presents only the test of a jury case or if it also lays down a test of causation.

The FELA and Jones Act provide the "framework" to implement the general congressional intent to provide

liberal recovery for injured workers. *Kernan v. American Dredging Co.*, 355 U.S. at 432.[4] Petitioner contends that the Fifth Circuit has thwarted congressional intent because in his case the Fifth Circuit refused to apply the *Rogers* test of causation.

A. Not All FELA Cases Present a Jury Question as to Causation.

In *Rogers*, the Court noted its earlier decisions which held that, under appropriate circumstances, the question of causation in FELA cases should be determined as a matter of law. In particular, the Court found that no jury question was presented in *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573 (1951); *Eckenrode v. Pennsylvania Railroad Co.*, 335 U.S. 329 (1948); *Brady v. Southern Railway Co.*, 320 U.S. 476 (1943). Some circuits maintain, however, that *Rogers* did not set up a test of liability but, rather, "the test of a jury case." *Bertrand v. Southern Pacific Co.*, 282 F.2d 569, 573-74 (9th Cir. 1960), *cert. denied*, 365 U.S. 816 (1961); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770 (9th Cir. 1981); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 681 (10th Cir. 1981). The circuits are in conflict.

B. Other Circuits Agree With Petitioner's Contention That Liability Follows Negligence if It Played Any Part in Petitioner's Injuries.

The First Circuit recently discussed the causation issue in *Santana v. United States*, 572 F.2d 331 (1st Cir. 1977). There, the employee slipped and was injured when he fell on greasy hoses and cables spread across the deck. *Id.* at 333. The First Circuit cited *Rogers* for the proposi-

[4]The standard of liability under the Jones Act is governed by the substantive provisions of the FELA. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957). Accordingly, Jones Act and FELA precedent will be analyzed interchangeably.

tion that a "plaintiff need show only that defendant's negligence *or* the dangerous condition was a cause of plaintiff's injuries." *Id.* at 335 (emphasis added). Again, in *Peymann v. Perini Corp.*, 507 F.2d 1318, 1324 (1st Cir. 1974), *cert. denied*, 421 U.S. 914 (1975), the court cited *Rogers* for the idea that liability follows if there is a "connection" between defendant's negligence and the employee's injury, but the negligence "need not be *the* cause" in order for the plaintiff to recover. *Id.* at 1324 (emphasis in Opinion).

Similarly, the Second Circuit views *Rogers* not as a test of a jury question, but as a test of causation. In *Miller v. Erie Lackawanna Railway Co.*, 645 F.2d 140 (2d Cir. 1981), the issue was whether the court erred in finding that the plaintiff had not suffered any aggravation of a previous injury as a result of the railroad's negligence. *Id.* at 141. The Court of Appeals treated the *Rogers* test not as a test for a jury case, but as a test of causation, and reversed the trial court's decision. *Id.* at 144. *See also Farnarjian v. American Export Isbrandtsen Lines, Inc.*, 474 F.2d 361, 363, (2d Cir. 1973); *DeLima v. Trinidad Corp.*, 302 F.2d 585, 587-88 (2d Cir. 1962).

C. The Fifth Circuit Has Ignored Its Own Precedent.

The Fifth Circuit has dealt with the issue of causation in FELA or Jones Act cases in *Reyes v. Vantage Steamship Co.*, 558 F.2d 238 (5th Cir. 1977); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965). Each case presented facts similar to those in the instant case. In each case, the court appears to have treated the *Rogers* test as one of causation.

In *Reyes*, a seaman drowned after jumping overboard to swim. The employer had violated a safety regulation

by failing to have a lifeline apparatus on board. The Fifth Circuit held that the issue of legal causation was established under the evidence as a matter of law. 558 F.2d at 243-44.

Spinks involved a seaman who fell and was injured on the very deck he was washing down with a co-worker in a negligent manner. Although the trial court found that the seaman's negligence was the "sole proximate cause" of his injury and the co-worker also was negligent, the Fifth Circuit reversed. The co-worker's negligence was imputed to the employer and, "[u]nder the Jones Act, even the slightest negligence suffices for a finding of liability." 507 F.2d at 221.

In *Page*, the issue was whether an employee's negligence could be the sole proximate cause of his injuries when the railroad also was negligent. The Fifth Circuit stated that "ordinarily in FELA cases there is really no place for [sole proximate cause] in the jury submission." 349 F.2d at 826.

Yet, in Petitioner's case, the Fifth Circuit spurned its earlier accurate interpretations of *Rogers* that the "single question [is] whether negligence of the employer played any part, however small," in the injury of which an employee complains. *Rogers,* 352 U.S. at 508. Certainly, once the jury decided the fact question that the railroad was negligent, causation should have followed as a matter of law. But for the railroad's negligence, the Petitioner would not have been crushed between equipment rolling in opposite directions. The district court erred when it denied Petitioner's motion for judgment n.o.v.

The decisions interpreting *Rogers* as merely setting out the test for a jury case must be corrected. As in the instant case, when a jury blatantly ignores a defendant's

negligence which caused injuries to the employee, the plaintiff is entitled to judgment n.o.v. The remaining circuit courts need to be assured that they are properly following the congressional intent behind the FELA and Jones Act.

D. Strict Adherence to a Rogers Jury "Test" Contravenes Congressional Intent and Leads to a Lack of Uniformity in the Application of a Federal Statute.

As stated by this Court, the FELA "was enacted because the Congress was disatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or *in part* to the employer's negligence." *Rogers*, 352 U.S. at 507. When some of this country's federal circuit courts ignore the mandate of Congress, they must be brought back into line. The statute should be interpreted uniformly so as to afford all litigants, regardless of the circuit in which they bring suit, the same opportunity for compensation for injuries caused "in whole or in part" by the railroad's negligence.

III.

BECAUSE THE FIFTH CIRCUIT APPLIED A LOCAL RULE IN A MANNER INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE, PETITIONER DOMINEY HAS BEEN DENIED PROCEDURAL AND SUBSTANTIVE RIGHTS.

Even if this Court determines that the Petitioner cannot claim as a matter of law that the railroad's negligent acts caused his severe injuries (at least in part), justice requires that he be granted a new trial. Either the jury did not understand that the railroad was liable if its negligence was even partially responsible for Petitioner's injuries, or the jury did not follow the charge of the court,

or some outside influence was responsible for its illogical verdict. There were neither probative facts in the evidence nor a reasonable evidentiary basis for the jury's decision. Further, the jury's findings are internally inconsistent, indicating serious error in the process. Petitioner cannot even know whether he received a fair trial because the trial court refused to allow him to interview the jurors in a timely fashion.

A. The Circuits Need This Court's Guidance as to the Proper Relationship Between Local and Federal Rules in the District Courts.

This Court has the power to prescribe the rules of procedure for district courts. 28 U.S.C. §2072. The Court has done so by promulgating the Federal Rules of Civil Procedure. *Hanna v. Plumer*, 380 U.S. 460, 464 (1964). District courts have the authority to formulate their own local rules. Such rules must "be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. §2071. Specifically, Rule 83 of the Federal Rules provides that district courts can make local rules which are "not inconsistent with these rules." Fed. R. Civ. P. 83. The Federal Rule at issue in this case is Rule 59. Rule 59 permits a party to move for a new trial based on affidavits by serving the affidavits with the motion within ten days after the entry of judgment. Fed. R. Civ. P. 59. Section 2071 and Rule 83 must be read in conjunction with Rule 59.

A local rule for the Northern District of Texas prohibits anyone from contacting jurors to obtain affidavits (or for any other reason) without "explicit leave of the Court." Local Rule 8.2(d). On its face, the local rule does not appear to be inconsistent with Rule 59. In Petitioner's case, however, the district court denied the oral motion made as soon as the verdict was read and procras-

tinated in granting the Petitioner's written motion to interview the jurors and obtain the necessary affidavits until twenty-one days after entry of judgment which was eleven days after the expiration of the ten-day period allowed by Rule 59. The district court's untimely ruling effectively denied the Petitioner the very affidavits he needed to support his motion for a new trial under Rule 59. Therefore, the local rule was applied in a manner inconsistent with Rule 59. A local rule which is "consistent" with the Federal Rules under section 2071 and not inconsistent with Rule 83 nevertheless does not remain so if it is inconsistent as applied.

Litigants must have a method for determining whether their case was determined by an impartial jury. The American Bar Association has stated that

> [w]here testimony and affidavits of jurors may be received in support of or against a motion for a new trial, a lawyer, in his obligation to protect his client, must have the tools for ascertaining whether or not grounds for a new trial exist, and it is not unethical for him to talk to and question jurors.

ABA Comm. on Professional Ethics and Grievances, Formal Op. 319 (1967).[5] The district court's application of a local rule deprived Dominey's lawyer of the very tool he needed in order to protect his client.

The Fifth Circuit Court of Appeals summarily dismissed the trial court's error: "Dominey concedes that he never attempted to file any juror affidavits in support of his post-trial motions asserting improper conduct." Appendix 2 (page 2). It would have been pointless for Dominey to obtain affidavits after the expiration of the ten-day period following the entry of judgment allowed under Rule 59. The affidavits were needed to support the motion for a new trial. The ten-day limitation is not

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[5]This Formal Opinion is cited in the Code of Professional Responsibility DR 7-108(d) (1979).

tolled while a trial judge ponders whether to permit counsel to interview jurors. *Howard v. Burlington Northern, Inc.*, 75 F.R.D. 644, 646 (Ore. 1977), *aff'd*, 588 F.2d 842 (9th Cir. 1978).

In fact, the ten-day time period may not be extended and cannot be circumvented for any reason. *Stradley v. Cortez*, 518 F.2d 488, 492 (3d Cir. 1975). For example, in *Bucantis v. Midland-Ross Corp.*, 81 F.R.D. 623, 624 (E.D. Pa. 1979), the petitioner attempted to add a ground in support of his motion for a new trial (counsel had just learned of a new decision) twenty-eight days after the running of the ten-day time limit. The court stated that the additional ground would not be considered because it was not served within the ten-day period. *Id.*

The Fifth Circuit, however, apparently would have litigants obtain affidavits in support of motions for a new trial under Rule 59 which are worthless because of the ten-day time bar. The Court of Appeals suggested that not doing so was a "concession" which is somehow fatal to a petitioner's cause as "prejudicial." Further, the Court of Appeals failed to hold the district court in check because it failed to confront the issue of the district court's application of a local rule, which was inconsistent with a Federal Rule.

The Fifth Circuit is at odds with the Third Circuit. In *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), a local district court rule empowered the district court to require prior judicial approval of communications between plaintiffs, their attorneys, or third parties, when that communication was for the purpose of encouraging common participation in a lawsuit. *Id.* at 164. The local rule was inconsistent with Rule 23 of the Federal Rules. The Third Circuit Court of Appeals concluded that the

local rule was "outside the power granted to the district court and its enforcement may be prevented." *Id.* at 164.

The Ninth Circuit also has addressed the issue of the propriety of a local rule if it is applied in a manner which is inconsistent with a Federal Rule: The district court cannot give an "effect" to a local rule in such a manner as to be inconsistent with a Federal Rule. *Dredge Corp. v. Penny,* 338 F.2d 456, 461 (9th Cir. 1964). In *Dredge,* the local rule did not specifically allow for a party opposing a motion for summary judgment to apply for oral argument. *Id.* The Court of Appeals interpreted Federal Rule 56(c) as "contemplat[ing] that a hearing will be held." *Id.* Consequently, "a district court may not, by rule or otherwise, preclude a party from requesting oral argument." *Id.* at 462.

The Fifth Circuit's holding in the instant case is contrary to its own holding in *First National Bank v. Small Business Administration,* 429 F.2d 280 (5th Cir. 1970). There, according to local practice, the court instructed the jury and ordered it to retire for deliberations before objections to the charge were heard. This is contrary to Rule 49(a) of the Federal Rules of Civil Procedure. *Id.* at 284-85. The Court of Appeals concluded that such a local "practice" inconsistent with Federal Rule 49(a) was impermissible. *Id.*

The Ninth Circuit's reasoning should be applicable to all cases where a local rule, as applied, is inconsistent with a Federal Rule. The Fifth Circuit's maverick behavior in the instant case threatens "the goal of uniformity of federal procedure posed by the decision below." *Hanna v. Plumer,* 380 U.S. at 463. The court's application of its local rule also denied this Petitioner procedural rights guaranteed by Rule 59.

B. A Constitutional Issue Exists as to Whether a District Court Can Invoke a Local Rule in Such a Way as to Deny a Litigant the Opportunity to Ascertain Whether an Impartial Jury Gave Him a Fair Trial.

The Seventh Amendment guarantees an impartial jury in civil trials. *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981). An impartial jury is crucial to a party in order to obtain a fair trial. *Id.* Further, "on a motion for a new trial . . . a juryman may testify upon the question of the existence of any extraneous influence" which may have led to the denial of a fair trial. *Mattox v. United States*, 146 U.S. 140, 149 (1892).

The jury in Petitioner's trial found that Santa Fe violated its own safety rule in moving the locomotive before Dominey was in the clear, that this violation was negligence, but that that negligence did not cause the injuries Dominey received when the backing locomotive crushed him against the side of the caboose. Liability is predicated upon negligence. The Court of Appeals surmised first that "such negligence did not necessarily contribute to [the] accident." Appendix 1 (page 4). Or, "[t]he jury could have determined fault found on the Railroad's part was solely related to the avoidance of an equipment collision, or that Dominey should not have stepped off the caboose, or that such action or some momentary diversion of Dominey's attention was the sole cause of his being struck by the locomotive." Appendix 1 (page 2). The Court of Appeals refused to consider a third possibility raised by the Petitioner: Juror misconduct could just as easily have been — and in light of common sense most likely was — the reason for the jury's failure to find that the Railroad's negli-

gence caused Dominey's injuries "in whole or in part." Juror misconduct could have denied this Petitioner a fair trial.[6]

In any event, the Court of Appeals should not have engaged in guessing games when there was a procedure for determining whether juror misconduct denied the Petitioner his Constitutional right to a fair trial. If a local rule can prevent review of juror misconduct, the Seventh Amendment no longer protects the rights of citizens to a fair trial.

CONCLUSION.

In the end, the ideal articulated by this Court in *Rogers v. Missouri Pacific R. Co.* says it all. Congress has given railroad employees a substantive right: "The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence." 352 U.S. at 507 (emphasis in Opinion). This Court has acknowledged that it has an "obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Id.* at 509. Substantive rights have no meaning unless all employees like the Petitioner can go to court and obtain the remedy Congress granted in the FELA. The Fifth Circuit's "narrow and niggardly" construction of the Act will erode the rights of all employes covered by the FELA.

Simply put, the Petitioner was permissively standing within a "zone of danger" beside a caboose in which he

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[6]On voir dire, jury foreman Moore first admitted that he really did not know if he could be a fair and impartial juror in this case because "we move an awful lot of grain by rail." [RT 3] Even though Moore later allowed as how he *thought* he could render a fair verdict, [RT 6], an interview could have determined whether he was involved in any juror misconduct.

had been riding when a co-worker violated a Santa Fe safety rule and negligently directed two locomotives to back onto that same track before the Petitioner and the caboose were clear of the zone of danger. He was crushed between the locomotives and the side of the caboose — his body spun like a pencil being rotated between two hands moving in opposite directions.

The problem here is that the Fifth Circuit (and other circuits) has chosen to misinterpret Congressional intent as construed by this Court. Compounding its error, the Fifth Circuit permitted the district court's roadblock of Petitioner's procedural rights to stand because it refused to find that the application of a local rule in contravention of a Federal Rule of Civil Procedure and the United States Constitution was error. Petitioner thus was denied any opportunity to ascertain whether he received a fair trial.

The equities of this factual situation, the urgent need to clarify the true nature of the *Rogers* test, and the compelling need to instruct the district court on the proper relationship between local rules and the Federal Rules of Civil Procedure, require the intervention of this Court.

Respectfully submitted,

W. James Kronzer,
Kronzer, Abraham, Watkins,
Nichols, Ballard & Friend,
Fred Misko, Jr.,
W. Page Keeton,
Scott, Douglas & Keeton,
R. Edward Pfiester, Jr.,

Attorneys for Plaintiff-Appellant,
Rodney E. Dominey.

APPENDIX 1.

In the United States Court of Appeals for the Fifth Circuit.

Rodney E. Dominey, Plaintiff-Appellant, versus The Atchison, Topeka & Santa Fe Railway Company, Defendant-Appellee. No. 82-1531 Summary Calendar.

Appeal from the United States District Court for the Northern District of Texas.

DATED: July 25, 1983.

Before GEE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

The plaintiff Dominey, a railroad employee, appeals from judgment dismissing, after jury trial, his suit against his employer railroad under the Federal Employers' Liability Act, 45 U.S.C. §§51 et seq. His sole contention is that the district court erred in denying his motion for judgment notwithstanding the verdict, because reasonable minds could not differ in concluding that the defendant railroad's conduct was a legal cause of the plaintiff Dominey's injury.

The jury found in special interrogatories that the railroad was negligent in directing a locomotive to back up before the caboose in which Dominey was riding was clear of a fouling/clearance point, but it also found that this negligence was not "a legal cause, in whole or in part, of the accident in question."

The accident had occurred when the plaintiff Dominey stepped off a slowly moving caboose and shortly afterwards was struck by a backing locomotive on an adjacent track. The jury also found in answer to a special interrogatory that the defendant railroad had *not* failed to adequately warn the plaintiff Dominey of the backward movement of the locomotive. As a result of its answer to the previous interrogatories, the jury did not reach

and was not required to make findings as to whether the plaintiff was contributorily negligent and as to the respective percentages of negligence of the two parties. No objection is raised on appeal as to the scheme or content of the special interrogatories.

The jury found that the railroad's negligence was not a legal cause of the plaintiff's accident, pursuant to an instruction to which the plaintiff made no objection:

> For purposes of this action, negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from a preponderance of the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damages suffered by the plaintiff, you may find that such injury or damage was legally caused by the defendant's act or omission. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

Under the evidence, instructions, and contentions submitted to the jury, the effect of the jury's finding that the defendant's negligence was not a legal cause, in whole or in part, of the accident was a determination that the employee's negligence was the sole cause of the accident. See Page v. St. Louis Southwestern Railway Company, 349 F.2d 820, 822-24, 824-25 n.12, 827 (5th Cir. 1965), approving the method followed by the present district court of submitting the issues of employer and employee negligence to the jury as consonant with Rogers v. Missouri Pacific Railroad Company, 352 U.S. 442, 506-07, 77 S.Ct. 443, 448-49 (1957).

Without detailing them, there are either probative facts in the evidence or a reasonable evidentiary basis (whatever the test) by which the jury could conclude that the negligence of the railroad in the respect found did not cause or contribute to the accident resulting when Dominey stepped off the caboose and was struck by the backing locomotive on the adjacent track. That is, while (as found by the jury) the locomotive was negligently directed to back up on the siding track before the caboose on the main line had passed the fouling/clearance point (the point at which the caboose and locomotive would brush another, *if* at that time side-by-side on the adjacent tracks; which, then, they were *not*), such negligence did not necessarily contribute to an accident that would occur at a subsequent time if an employee stepped off the caboose and was struck by a backing locomotive (which he had failed to observe) that by then was adjacent to the caboose at a point where the locomotive and the caboose would not strike one another.

Therefore, despite the extremely scholarly and persuasive brief by Dominey on appeal, we are unable to find that the district court erred in denying the plaintiff's motion for judgment notwithstanding the verdict for essentially the reasons set forth in its order of September 7, 1982. Consequently, we AFFIRM the district court's take-nothing judgment entered against the plaintiff.

AFFIRMED.

APPENDIX 2.

In the United States Court of Appeals for the Fifth Circuit.

Rodney E. Dominey, Plaintiff-Appellant, versus The Atchison, Topeka & Santa Fe Railway Company, Defendant-Appellee. No. 82-1531.

Appeal from the United States District Court for the Northern District of Texas.

DATED: March 20, 1984.

Before CLARK, Chief Judge, RUBIN and POLITZ, Circuit Judges.

PER CURIAM:

In this Federal Employers Liability Act (FELA) case, Rodney Dominey, a railroad conductor, was injured when struck by the defendant's locomotive during a switching operation. In response to special interrogatories, the jury found by the preponderance of the evidence that the defendant "directed the locomotive to back up before the caboose on which Dominey was riding was clear of the fouling/clearance point,"[1] and that this action was negligence. The jury also found, however, that this negligence was not "a legal cause, in whole or in part, of the accident in question." Judgment was entered for the defendant. Dominey appeals the district court's denial of his alternate motions for judgment notwithstanding the verdict and for a new trial. We affirm.

The record contains probative evidence on the issue of causation under FELA, which required submission to the jury. The trial court properly instructed that "negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually

[1]The "fouling/clearance point" or "zone of danger" is the area in the crotch formed by the intersection of a spur and straight track where equipment on the separate tracks is in danger of colliding.

causing the injury or damages." Dominey made no objection to this instruction. Indeed, the language used by the court is legally indistinguishable from that requested by Dominey.

Dominey contends it was impossible for the Railroad's negligence, which the jury found, not to be causative of his injury in some degree. This contention is not well taken. The jury could have determined fault found on the Railroad's part was solely related to avoidance of an equipment collision, or that Dominey should not have stepped off the caboose, or that such action or some momentary diversion of Dominey's attention was the sole cause of his being struck by the locomotive. Causation was a fact issue for the jury. They decided it under a proper charge and that ends the issue for this appeal.

Dominey also contends that the trial court committed reversible error by not granting his motion to interview jurors until the expiration of ten days after entry of judgment.[2] Dominey concedes that he never attempted to file any juror affidavits in support of his post-trial motions asserting improper conduct. He has failed to demonstrate prejudicial error.

For these reasons, the judgment of the trial court is AFFIRMED.

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[2]A local rule of the district court forbade any contact with jurors without court permission.

APPENDIX 3.

Mr. Gilbert Ganacheau, Clerk
Court of Appeals
600 Camp St.
New Orleans, La.

Re: No. 82-1531, Rodney E. Dominey v. The Atchison, T.&S.F. Ry. Co., U.S. Ct. of Appeals (Fifth Circuit)

Dear Sir:

The Court granted leave to list these additional authorities on these subjects:

(1)

The "Impeachment" Testimony of the Witness Hogan

The Court inquired if there was *any* evidence concerning the cigarette lighter which Mr. Dominey was allegedly retrieving. We suggest the testimony suggestive of that fact was from Mr. Hogan, a supervisory employee, who was called and stated that some 4 or 5 months after the accident he was told by Mr. Aydellotte that the latter saw him (or told him) try to pick up a lighter. (p. 1158.) This notwithstanding Aydellotte's statement to the railroad agent *that* day to the contrary.

It was purely "hearsay" and not probative since not under oath.

Rules of Evidence 801(d)(1)(A) [1] and 802, *Garcia v. U.S.*, 530 F.2d 650 (5th Cir. 1976), *United States v. Ragghianti*, 560 F.2d 1376, 1381 (9th Cir. 1977)

Other Authorities on 100% "Sole Cause"

(2)

In addition to *Spinks* and *Reyes*, which we have cited in our briefs, we also cite

Santanna v. United States, 572 F.2d 331 (1st Cir. 1977) — per Ingraham

(3)

On "Proper tests" to be Applied

While we perhaps have not made it as clear as we should have in our primary brief, we have always asked for a new trial or remand, and have made that more clear in our Motion for Rehearing.

The first panel (Judges Gee, Randall and Tate) so understood our position.

We also cited in our argument the recent decision of this Circuit in *Robin v. Wilson Bros.*, 719 F.2d 96 (Oct. 10/83), which clarifies our request on both the "no probative evidence," the law question, and "no reasonable evidentiary basis" to sustain the action of the trial judge in overruling the motion for new trial.

Also, *Robin* and other recent cases in this Circuit, have questioned whether the employee has as heavy a burden to move for a directed verdict as does the employer simply because in *all* cases like this the entire case must be remanded under either test.

We do at least ask the Court to consider the legal and abuse of discretion grounds.

Respectfully,

/s/ W. James Kronzer
W. James Kronzer

cc: Mr. Don Hermann
2300 Texas American Bank Bldg.
Fort Worth, Texas